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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 522

MAX SILVERMAN,

Petitioner,

vs.

OSBORNE REGISTER CO.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Max Silverman, an individual, respectfully shows to this Honorable Court, as follows:

Petitioner's business is that of supplying premiums to radio sponsors of nationally advertised goods (R. 12), and pins and emblems to such organizations as the American Red Cross, British War Relief Society and Office of Price Administration (R. 12, 13, 14, 19). In June, 1943 (R. 20), petitioner began to work with representatives of the Office of Emergency Management, Office of Price Administration and War Production Board in connection with the develop-

ment of information relative to the requirements to be adopted by the Government for the manufacture of ration tokens for the national rationing program (R. 38) and the availability of acceptable materials for such manufacture. This early work was performed by petitioner with the expectation that he would personally submit a bid to manufacture the required tokens in connection with the Government contract for their manufacture which was to be awarded by competitive bidding (R. 39). He spent all of his time and energy on the project and neglected his other business completely while doing so (R. 27).

After petitioner had made an arrangement with the respondent for the latter to manufacture the required ration tokens for him as petitioner's sub-contractor (R. 11, 12, 39), petitioner was informed by the O.P.A. that he could not bid on the ration token contract because the Government intended to maintain close surveillance over the tokens and their manufacture and he did not own the factory in which the manufacturing was to be done (R. 13, 39). He thereupon communicated this information to the respondent and, at respondent's suggestion, they entered into an agreement jointly to submit a bid in respondent's name to the Office of Emergency Management in response to invitations to bid to be issued by that office, at the price at which the respondent had theretofore agreed to manufacture the tokens for petitioner as his sub-contractor plus fifteen percent thereof for petitioner which was to compensate him for his expenses and his work and the balance was to be his profit (R. 14, 37-40). That bid price was exactly the same price petitioner had intended bidding in his own name when it was contemplated that respondent would merely act as petitioner's sub-contractor (R. 39).

Petitioner and respondent continued to work together in the furtherance of their agreement and jointly submitted

their bid in respondent's name for the Government contract which was to be let by competitive bidding. When it became known that said bid was the low bid, respondent repudiated its agreement with the petitioner (R. 17, 18, 19, 22). The contract for the manufacture of the ration tokens was shortly thereafter awarded to the respondent by the Office of Emergency Management on the basis of said bid, and substantial profits were realized therefrom. Petitioner then brought his action below to recover his share of the profits pursuant to said agreement (R. 2).

While the case was pending on the trial calendar in the District Court, respondent filed a motion for summary judgment on the ground that the contract sued on was illegal and void on the ground of public policy (R. 35). The District Court granted the motion on "the general principle laid down broadly in Tool Co. *v.* Norris, 2 Wall. 45," and because the tendency of the agreement "was to have the government pay fifteen percent more than it would presumably have paid under the circumstances" (R. 41). From the judgment for the respondent entered on the order granting the motion for summary judgment (R. 42), petitioner appealed to the United States Court of Appeals for the District of Columbia, and that Court affirmed the judgment on June 20, 1946 (R. 48). The opinion of the Court of Appeals was written by Mr. Justice Bennett Champ Clark, and the entire opinion is in the record (R. 45-47).

On the appeal, petitioner urged that:

(i) The contract sued on was not a contract for the procurement of a Government contract on a contingent basis and, therefore, the principle of *Providence Tool Co.* v. *Norris, supra,* relied on by the trial judge, was not applicable;

(ii) Even if the contract were construed to provide for contingent compensation for procuring a Government contract, the contract was not against public policy but was

legal and valid since no improper or corrupt means were used or contemplated in its procurement, notwithstanding the broad but partially overruled doctrine of *Providence Tool Co.* v. *Norris, supra,* and the Government contract itself was subject to award by competitive bidding and not by negotiation; and

(iii) Petitioner and respondent were joint enterprisers in bidding on and performing the Government contract, and such enterprise was not illegal even if it had the incidental effect of lessening of competition to the extent that there was one less bidder.

By its decision, the U. S. Court of Appeals for the District of Columbia

(i) and (ii) held the contract to be "illegal at its inception and hence void and unenforceable" (R. 47), basing its ruling solely on the principle of *Providence Tool Co.* v. *Norris, supra,* and disregarding entirely the absence of the actual or contemplated use of improper or corrupt means and the fact that the Government contract was to be awarded by competitive bidding thereby negativing possible personal influence; and

(iii) refused to hold that the contract created a joint enterprise.

Jurisdiction

The decision of the United States Court of Appeals for the District of Columbia was rendered on June 20, 1946 (R. 45). Jurisdiction of this Court is based on Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, Ch. 229, 43 Stat. 936, 28 U. S. C. A., Section 347(a).

Questions Presented

1. Is the broad principle of *Providence Tool Co.* v. *Norris, supra,* upon which the decision below was based, still good

law, insofar as it does not distinguish between cases where improper or corrupt means are used or contemplated and cases where such means are not used or contemplated?

2. Is *Providence Tool Co.* v. *Norris, supra,* applicable where the award of the Government contract is made by competitive bidding?

3. Did a joint enterprise exist between petitioner and respondent, and was it illegal because the joinder of parties in the enterprise had the incidental effect of lessening competition by reducing by one the number of persons bidding on the Government contract?

Reasons Relied On for Allowance of the Writ

Petitioner relies on the following reasons why a writ of certiorari should be granted to review the decision of the United States Court of Appeals for the District of Columbia:

1. The United States Court of Appeals for the District of Columbia has decided a question of general importance to the country at large. In connection with the recent vast war-time procurement program, the Government has completed an unprecedented volume of contracting. The effect of the decision below is to make all contracts for compensation contingent upon the procurement of Government contracts void on the ground of public policy, regardless of the bona fides of the parties to the contract and regardless of their use or contemplated use of proper or non-corrupt means.

2. The United States Court of Appeals for the District of Columbia has failed to give effect to applicable decisions of this Court:

(a) By holding that no joint enterprise existed, thereby failing to give effect to the principle announced

by this Court in *Hyer* v. *Richmond Traction Co.*, 168 U. S. 471, 42 L. Ed. 547.

(b) By adopting the original announcement of this Court in *Providence Tool Co.* v. *Norris, supra*, without giving proper effect to the later decisions of this Court which have restricted the breadth of the doctrine there announced.

Steele v. *Drummond*, 275 U. S. 199, 72 L. Ed. 238;
Valdes v. *Larrinaga*, 233 U. S. 705, 58 L. Ed. 1163.

Prayer

WHEREFORE, your petitioner prays for the allowance of a writ of certiorari to the United States Court of Appeals for the District of Columbia in this case there entitled "Max Silverman, appellant, vs. Osborne Register Company, appellee, No. 9185," that said cause may then be reviewed and determined by this Court and the judgment below (155 F. (2d) 879) may then be reversed.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion Below

The opinion of the United States Court of Appeals for the District of Columbia appears at page 45 of the Record, and is officially reported at 155 F. (2d) 879.

Questions Presented

The questions presented are stated in the petition, *supra*.

Specification of Errors

1. The contract created a valid joint enterprise which was outside the scope of *Providence Tool Co.* v. *Norris*.

2. The lower Court erred in granting the respondent's motion for summary judgment and in ruling that the contract sued on was "illegal at its inception and hence void and unenforceable" (R. 47) under the rule announced in *Providence Tool Co.* v. *Norris*.

3. *Providence Tool Co.* v. *Norris* is not good law insofar as it does not distinguish between cases where improper or corrupt means are used or contemplated and cases where such means are not used or contemplated.

4. *Providence Tool Co.* v. *Norris* does not apply where the Government contract is awarded by competitive bidding.

ARGUMENT

The writ should be granted because the opinion below erroneously applied the doctrine of Tool Co. v. Norris and failed to give effect to applicable decisions of this Court.

1. *In ruling that there was no joint enterprise the opinion below failed to give effect to Hyer* v. *Richmond Traction Co., 168 U. S. 471, 42 L. ed. 547.*

In the Court below petitioner urged that he and respondent were engaged in a joint enterprise to obtain and per-

form the Government contract for the manufacture of ration tokens, and that the principle of the *Tool Co.* case did not apply because the agreement to pay compensation to petitioner was not for services in procuring the Government contract. Nevertheless, the opinion states that "it would be a travesty on the term to dignify this bargain by calling it a 'joint venture' " (R. 47). We submit that the record justifies the conclusion that a joint venture was created, and no travesty on the term results from so characterizing the agreement because of the complete lack of any suggestion of bad faith and the sound and legitimate reasons which prompted the enterprise.

In the agreement petitioner agreed to perform, at his own expense, such services as might be required to ascertain the existence of material which was non-essential to the war effort or to develop the availability and practicability of other material which could be used effectively in the production of ration tokens by the respondent, to obtain the necessary allocation of such material to the extent required for the manufacture of the ration tokens, to confer with Government officials, to use his unusual experience in the type of work involved to settle all problems relating to the specifications to be made applicable, including the demonstration to the satisfaction of such officials that vulcanized fiber was in fact the best material to use and that its use would be to the public's interest, to arrange with Government officials for the approval of respondent's facilities to be used in manufacturing the product, and otherwise to establish the respondent's qualifications to assume a contract for the manufacture of the product in the quantity and within the time fixed by O.P.A. (R. 37). In the agreement respondent was to submit a joint bid in its own name for the manufacture of the ration tokens out of vulcanized fiber or other extruded material and perform the

manufacturing on behalf of petitioner and itself (R. 14, 37). Factually and legally the parties became joint enterprisers for the purpose of bidding and performing any contract that might result therefrom.

It should also be noted that petitioner originally intended to bid in his own name and make his usual arrangement with the respondent for the necessary manufacturing, in quite the same manner as respondent had frequently acted as petitioner's sub-contractor (R. 11, 39, 40). The agreement to join in bidding in the name of one of the parties was reasonable, honest and was for a legitimate purpose. The agreement between the parties was prompted only by the fact that petitioner had become disqualified to bid in his own name because the Government had adopted a policy requiring close surveillance over the tokens during manufacture, and because thereof the bidder had to be the owner of the manufacturing facilities.

The relationship between joint venturers or joint enterprisers is similar to the relationship between partners and is governed by partnership law. While the term partnership generally characterizes a general and continuing venture, a joint enterprise designates a venture limited to one transaction. It is not necessary to constitute a joint enterprise that the parties furnish capital or services in equal amount. If they agree what each is to do or contribute and agree on the sharing of profits, a joint enterprise is created.

Kasishke v. *Baker*, 146 F. (2d) 113;
Aiken v. *Mills*, 144 F. (2d) 23;
Motter v. *Smyth*, 77 F. (2d) 77;
Dexter & Carpenter v. *Houston*, 20 F. (2d) 647;
In re Asiatic Exploration, 41 F. (2d) 230;
Annotation 63 A. L. R. 909.

In *Hyer* v. *Richmond Traction Co.*, *supra*, plaintiff and defendant had separately negotiated with a city for a street

railway franchise. They then agreed to cooperate so as jointly to obtain the franchise and divide equally the profits. The defendant obtained the franchise in its name and later refused to recognize plaintiff's one-half interest. This Court said:

> "As said by the New York court of appeals in Atcheson *v.* Mallon, 43 N. Y. 147, 151: 'A joint proposal, the result of honest cooperation, though it might prevent the rivalry of the parties and thus lessen competition, is not an act forbidden by public policy. Joint adventures are allowed. They are public and avowed, and not secret. The risk, as well as the profit, is joint and openly assumed. The public may obtain at least the benefit of the joint responsibility, and the joint ability to do the service. The public agents know, then, all that there is in the transaction, and can more justly estimate the motives of the bidders and weigh the merits of the bid.' . . . It may be noticed that there is nothing in the agreement reduced to writing, or as interpreted by the facts stated, which tends to show any thought or purpose of using corrupt or improper influences to secure the action of the city council. So that, upon the record as it stands, the question is, narrowly, whether any agreement to unite between parties who have applied, or contemplate application, for a franchise is, under all circumstances, necessarily void as against public policy.
>
> "The case is also easily distinguishable from those contracts merely to abstain from bidding. An agreement not to bid tends to diminish the number of bidders and thus prima facie to lessen the probable profitableness of the sale or contract. Yet, even in cases of public sales, the rule laid down by this court is that agreements to unite in a bidding are not per se void. Some other element than the mere fact of union must exist before the agreement is to be condemned. Kearney *v.* Taylor, 15 How. 494, 14 L. ed. 787. . .
>
> "The observations thus made show that every case must be determined upon its peculiar facts and circum-

stances, and the courts, before condemning an agreement to unite in a bid, must see that the agreement is such as really destroys the value of competitive bidding. . . ."

The Supreme Court of Alabama, in the case of *Anderson* v. *Blair*, 202 Ala. 209, 80 So. 31, held that an agreement between plaintiff and defendant to use their joint efforts to obtain a Government contract for the construction of a military camp in which they were to contribute services and share in the profits after the contract was obtained, was a valid agreement. That court said:

"Appellee lays stress upon the decision in Tool Co. *v.* Norris, 2 Wall. 45, 17 L. ed. 868. In that case the court made use of this very broad expression: 'All agreements for pecuniary considerations to control the business operations of the Government, or the regular administration of justice, or the appointments to public offices, or the ordinary course of legislation, are void as against public policy.' In Lyon *v.* Mitchell, 36 N. Y. 235, 93 Am. Dec. 502, Judge Hunt, afterwards on the bench of the Supreme Court of the United States, expressed the opinion that the Tool Company case was not well considered, and in Bush *v.* Russell, supra, we indulged quotations from later decisions of the Supreme Court of the United States which very clearly demonstrated that the language of the Tool Company case was too broad, and that it is legitimate to employ agents to lay before officers authorized to contract for government all such information as may apprise them of the character and value of the articles offered, and enable them to act for the best interest of the country . . . agreements to procure Government contracts by 'lobbying', that is, by secret and corrupting influences, or by personal influence, are void as against public policy; but, where the contract evidences a purpose to engage in a fair business enterprise and there is no concealment of the agency, it is good and should be enforced."

2. *In ruling that the agreement was void because of public policy within the doctrine of Tool Co.* v. *Norris, the opinion below failed to give effect to Steele* v. *Drummond, 275 U. S. 199, 72 L. ed. 238 and Valdes* v. *Larrinaga, 233 U. S. 705, 58 L. ed. 1163.*

After citing the *Tool Co. case,* the opinion below states that the contract sued on was "patently against public policy" and "was illegal at its inception and hence void and unenforceable" (R. 47). The opinion does not give any reasons why the *Tool Co.* case is controlling. It says that the "trial court correctly applied the underlying principle of the Tool Co. case" (R. 46). The trial court had said that "the general principle laid down broadly in *Tool Co. v. Norris,* 2 Wall. 45, 54 is applicable" (R. 41).

The principle of the *Tool Co.* case is that all contracts for compensation contingent upon the procurement of Government contracts are void because "they suggest the use of sinister and corrupt means for the accomplishment of the end desired. The law meets the suggestion of evil, and strikes down the contract from its inception" (2 Wall. 45, 55). The principle declared by that case is that the absence of anything sinister or corrupt on the one hand, or the presence of good faith on the other, does not affect its sweeping pronouncement of invalidity on public policy grounds.

In the case at bar, respondent has effectively conceded, both in the District Court and in the Court of Appeals, that petitioner neither used nor contemplated the use of any improper, sinister or corrupt means. There is nothing in the record that even remotely suggests any such use or contemplation.

It was petitioner's contention below, and it is his contention here, that the contract between the parties was not a contract to procure an award of a Government contract.

The essence of the contract was the creation of a legitimate joint venture whereby each party was to perform certain duties and each was to share in the profits received. However, in view of the lower court's interpretation, which petitioner contends was wrong, it is petitioner's submission that even if the element of compensation contingent upon the procurement of a Government contract is involved, the contract here involved should be upheld notwithstanding the broad language of the *Tool Co.* case.

Petitioner submits that the sweepingly broad language of the *Tool Co.* case is not good law today, and the later decisions of this Court have definitely narrowed the breadth of the doctrine there originally announced and which the Court below adopted. The means actually used or contemplated to be used is a material and vital factor affecting legality, and it is petitioner's submission that, according to the later decisions, that factor is now determinative of legality.

Steele v. *Drummond,* 275 U. S. 199, 72 L. Ed. 238;
McGowan v. *Parish,* 237 U. S. 285, 59 L. Ed. 955;
Nutt v. *Knut,* 200 U. S. 12, 50 L. Ed. 348;
Oscanyan v. *Winchester Repeating Arms Co.,* 103 U. S. 261, 26 L. Ed. 539;
Houlton v. *Nichol,* 93 Wis. 393, 67 N. W. 715;
Hall v. *Anderson,* 18 Wash. (2d) 625, 140 P. (2d) 266 Annotation 46 A. L. R. 199.

In *Steele* v. *Drummond, supra,* this Court said, at page 205:

> "And it is a matter of great public concern that freedom of contract be not lightly interfered with. Baltimore & O. S. W. R. Co. *v.* Voight, 176 U. S. 498, 505. The meaning of the phrase 'public policy' is vague and variable; there are no fixed rules by which to determine what it is. It has never been defined by the

courts, but has been left loose and free of definition, in the same manner as fraud. . . .

"It is only in clear cases that contracts will be held void. The principle must be cautiously applied to guard against confusion and injustice. . . . Detriment to the public interest will not be presumed where nothing sinister or improper is done or contemplated."

Today, public policy objections are not presumed where nothing sinister or improper is done or contemplated. It is not the tendency of the agreement toward evil that determines whether public policy will strike it down, but whether in the particular case improper or corrupt means are used or contemplated to be used, that is, whether actual or potential harm to the public interest is made to appear. There is no presumption that corrupt or improper influences have been or will be used or that the public interest will suffer as a result of the Government entering into a contract which will be profitable to the person who sought its award. It is well established law that, until the contrary is clearly shown, the law presumes that the parties to a contract intended to accomplish a legal purpose. It is equally well established that contracts will not be declared void on public policy grounds except in cases free from doubt. In such cases real prejudice to the public interest must be affirmatively shown.

12 Am. Jr. 710;
Anno. 46 A. L. R. 201.

The Restatement of the Law of Contracts, Section 562, relating to "Bargains for Procuring Public Contracts," states as follows:

"A bargain to endeavor to secure a government contract by presenting to the official having power to make the contract inducements except such as relate to the

> desirability on public grounds of entering into the contract, is illegal; but if no influence other than those are bargained for, or contemplated, the bargain is not illegal."

The second illustration under that section reads as follows:

> "A, a manufacturer of goods, agrees with B to pay him a commission for all contracts that B can procure for purchase of goods of A's manufacture. . . . If no influence of a personal nature is bargained for or contemplated, the agreement is not illegal."

Section 563 of the Restatement relates to the contingent nature of the compensation, and states:

> "The fact that the compensation fixed in a bargain for efforts to secure legislation or official action is contingent on success, is not conclusive evidence that improper means are contemplated in securing the desired results."

Presumably, the contingent nature of the compensation would be just one factor, to be considered with all other evidence, in determining an issue as to whether improper means were used or contemplated.

In the case of *Valdes* v. *Larrinaga, supra,* the plaintiff was to receive a ten percent interest in the concession by the Government to a riparian owner of the right to utilize water power in developing electricity. Plaintiff's interest was based on his agreement to take the necessary steps to present the matter to the Secretary of War and to the Military Government of Puerto Rico, including the submission of plans, specifications and other technical data. This Court upheld the validity of plaintiff's contract for compensation. Although the marked factual similarity of that case would

appear to make that decision authoritative, it was not cited in the opinion below.

Conclusion

We respectfully submit that it is impossible to reconcile the decision below with *Steele* v. *Drummond, supra,* and *Valdes* v. *Larrinaga, supra,* if the case at bar is examined in its true light, that is, that no improper or corrupt means were either used or contemplated to be used. The foregoing submission is made on the theory that this Court may not be disposed to review the interpretation placed on the agreement by the Courts below to the effect that it constituted an agreement to pay compensation contingent upon the procurement of a Government contract. If such review is made, it is further submitted that the interpretation made below would be found to be incorrect, and the agreement should have been interpreted as a valid joint enterprise.

With respect to the lower Court's ruling of invalidity on public policy grounds, the following extract from the opinion by Sir George Jessel, M. R., in *Printing Co.* v. *Sampson,* L. R. 19 Eq. Cas. 462, should be noted:

> "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred, and shall be enforced by courts of justice."

It is respectfully urged that a writ of certiorari should issue to the U. S. Court of Appeals for the District of Columbia so that the questions raised herein may be re-

viewed by this Court and the decision below may then be reversed.

Respectfully submitted,

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